

**MONTGOMERY COUNTY, STATE OF MARYLAND**

Greencastle Lakes Community Association,	:
	: COMMISSION ON COMMON
Complainant	: OWNERSHIP COMMUNITIES
	: Case No. 87-06
vs.	: April 24, 2008
	:
Marlena Kelley,	:
	:
Respondent	:
	:
Panel Chair Memorandum By: John F. McCabe, Jr.	:

**MEMORANDUM DECISION AND ORDER**  
(Default)

The above captioned case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland pursuant to Chapter 10B of the Montgomery County Code, 1994, as amended and the Default Judgment Procedures adopted by the Montgomery County Commission on Common Ownership Communities on February 7, 2007. The Commission issued an Order of Default pursuant to those procedures on August 1, 2007 against Marlena Kelley, Respondent, for failure to file a responsive pleading to the complaint as required by Section 10B.06.01.03 of the Code of Montgomery County Regulations. The duly appointed Hearing Panel subsequently considered the evidence of record and finds, determines and orders as follows:

**BACKGROUND**

This is a complaint filed by Greencastle Lakes Community Association against one of the members of the Association, Marlena Kelley, arising from architectural violations at Ms. Kelley's property, 14203 Angelton Terrace, Burtonsville, Maryland. The record consists of:

- a. The Commission's case file;

- b. Greencastle Lakes Community Association booklet entitled “Homeowner Guide Greencastle Lakes Community Association”;
- c. The March 19, 2008 Attorney’s Fees Affidavit for Greencastle Lakes Community Association filed by counsel in support of the Association’s request for reimbursement of attorney’s fees.

The Order of Default entered August 1, 2007 ordered the Respondent, within 30 days from the entry of said order to do the following:

1. Submit to the Complainant a proper architectural change request for the fence that she has installed, to include a survey plat for the property that shows the location of the fence and a copy of the building permit for the fence issued by Montgomery County; and further, to replace 3 missing post caps.
2. Replace all missing shutters with those that match the remaining shutters, or else submit to the Complainant a proper architectural change request for the shutters if Respondent intends to change all of the shutters and replace them with shutters of an approved style and color.
3. Replace all missing screens, or else remove all screens from the front of the house so that the front windows of the house present a uniform appearance.
4. Reimburse Complainant the sum of \$50.00 (fifty dollars) to cover cost of filing this dispute.

Commission Case file at Pages 36 and 37.

Respondent did not comply with the Order of Default.

### **FINDINGS OF FACT**

1. Greencastle Lakes Community Association is a homeowners association within the meaning of the Maryland Homeowners Association Act, Real Property, Annotated Code of Maryland, Title 11B.

2. Marlena Kelly is a member of Greencastle Lakes Community Association and is subject to its covenants, by-laws, rules and regulations. Her property is a townhome located at 14203 Angelton Terrace, Burtonsville, Maryland.

3. Ms. Kelley's property is missing a shutter on the front of the home, missing a screen on the front window, and Ms. Kelley has installed a fence without obtaining prior approval from the Association. The Association requested the following relief in its Complaint:

- “1. Replace missing shutter on the front of the home;
2. Replace missing screen on front window;
3. Reimburse Greencastle Lakes Community Association the \$50.00 filing fee ;
4. Reimburse Greencastle Lakes Community Association for the attorney's fees incurred in this matter.”

Commission case file at Page 4.

4. From July 2004 to the date its Complaint was filed on December 13, 2006 Greencastle Lakes Community Association sent Marlena Kelley at least 10 separate notices regarding the above violations.

5. Pursuant to an application filed by Marlena Kelley on May 22, 2007, on June 27, 2007 Greencastle Lakes Community Association conditionally approved the existing fence in the rear yard. Commission case file at Pages 28 and 29. The condition was:

“Homeowner must provide a copy of the survey plat for the property on which the location of the fence is drawn in. Homeowner must provide a copy of the building permit issued by Montgomery County. Homeowner must install/replace three (3) missing post caps on the fence. This must be completed within thirty (30) days of the date of this letter, and enforcement action will proceed after that time if no response. In addition, the fence is still in violation until the above is completed.”

Commission case file at Page 22.

6. Ms. Kelley did not complete the conditions for approval.

7. Ms. Kelley did not file an answer to the Complaint.

8. Greencastle Lakes Community Association filed a Request for Order of Default on July 27, 2007. Commission case file at Page 34.

9. The Commission entered an Order of Default, as stated above, on August 1, 2007. Commission case file at Page 36.

10. The Commission sent Marlena Kelley a Notice of Default Order on August 3, 2007 advising Ms. Kelley pursuant to the Default Judgment Procedures that she could move to vacate the Order of Default within 30 days from the date of said notice. Commission Case file at Page 36. Ms. Kelley did not move to vacate the Order of Default.

11. Pursuant to the Attorneys’ Fees Affidavit submitted March 19, 2008 the Association has requested \$448.00 in attorney’s fees.

12. The claim for attorneys’ fees is based upon a provision in the Greencastle Lakes Community Association Architectural and Environmental Review Committee Standards and Guidelines (the “Homeowner Guide” or “Guidelines”), Paragraph V. 4., which states:

“Any costs for GLCA legal action during pursuit of its right to remove or correct violations shall be charged to the affected homeowner following resolution of the action.” Homeowner Guide at Page 40.

## **CONCLUSIONS OF LAW**

1. Failure to replace a missing shutter and to replace a missing screen on the Respondent's property constitute architectural changes without approval. Therefore, they are violations within the meaning of Article VII of the Greencastle Lakes Community Association Declaration dated March 27, 1985. Homeowners Guide at Pages 114-119. Construction of a fence without prior written approval by the Architectural and Environmental Review Committee is also a violation of Article VII.

2. The amount of attorney's fees requested, \$448.00 based on the Attorneys' Fees Affidavit is reasonable. However, the Panel finds that it cannot award the attorney's fees under Section 10B-13(d) Montgomery County Code. There is no affirmative misconduct that supports an award of attorneys' fees under that section. The Respondent Marlena Kelley simply did not participate.

Section 10B-13(d) also allows the award of attorneys' fees if association documents so provide. However the Panel is of the opinion that the phrase "costs for GLCA legal action" does not specifically include legal fees. In a number of covenants, particularly with regard to assessments, "costs" for bringing legal action are allowed. The term "costs" does not include legal fees. To award legal fees, the document in question must specifically so state. Hess Construction Company v. Board of Education, 341 Md. 155, 669 A.2d 1352 (1996), discusses the American Rule for recovery of attorney's fees applicable in Maryland. The rule is that attorney's fees are ordinarily not recoverable by a prevailing party unless they are awarded by a statute or under a contract between the parties. Attorney's fees may also be awarded by a court

rule. Absent a statute or contract or court rule, only ordinary court costs are recoverable by the prevailing party. Hess Construction, 669 A.2d at 1354.

Hess involved the interpretation of a court rule for mandamus actions that provided that in issuing a writ of mandamus the court may also award “such damages to the Plaintiff as he shall have proven.” The court stated that the mere mention of “damages” in the rule could not be construed to include an exception to the American Rule. Hess Construction, 669 A2nd at 1352.

In Bahena v. Foster, 164 Md. App 275, 883 A.2d 218 (2005), the Maryland Court of Special Appeals held that the term “cost” in Maryland Rule 2-603 did not include either attorney’s fees or expert witness fees. The court reiterated the general rule that costs and expenses in litigation other than the usual and ordinary court costs are not recoverable in an action for damages. Also in Benderson - Wainberg v. Atlantic Tours, Inc., 228 F. Supp. 2d 584 (E.D. Pa. 2002), the court held that the term “collection costs” in a lease was subject to more than one interpretation. The court therefore applied the rule of construction that an ambiguity must be construed against the drafter of the document. The drafter of the Guidelines in this case is the association. The plain language of the Guidelines, in the view of the Panel, does not take the association far enough to encompass attorney’s fees. While the Panel sees the association as the wronged party in this case, nevertheless, it would not be appropriate to stretch that language beyond what the Panel sees as its plain, objective meaning.

Therefore, although Section 10B-13(d) may allow for an award of attorneys’ fees based upon a rule or procedure adopted by the Board of Directors, nevertheless the above quoted section in the Homeowners Guide is not sufficient to support such an award. Since this is a Board regulation, it would not be a difficult matter for the Board of Directors of Greencastle

Lakes Community Association to amend the Homeowner Guide in the future to be specific regarding the award of “attorney’s fees”.

The Panel knows that there have been cases before other Commission panels interpreting this very section to allow an award of attorney’s fees. However the Panel does not agree with that interpretation.

This case involves a simple failure to participate in the process. The award of attorney’s fees in Greencastle Lakes Community Association v. Herman and Janice Muller, Case No. 829-G, had an independent basis for the award of attorney’s fees under Section 10B-13(d). In that case the Respondents sought a continuance of the hearing for purposes of settling the case. They then made no effort thereafter to settle the case. They requested a continuance of a second hearing and then failed to appear on the date they selected. The Complainant therefore had to prepare to present its case before the Panel. The Panel found that Respondents unreasonably contributed to the delay in resolving the dispute.

In Greencastle Lakes Community Association v. Dawit Abeje, Case No. 776-G, the hearing panel also found a basis under Section 10B-13 to conclude that the Respondents substantially delayed the dispute resolution process. The Panel relied on the Greencastle Guidelines as well. However, again, that case involved a hearing, whereas the present case did not.

Geencastle Lakes Community Association v. Christine Baker, Case No. 88-06, relied more directly on the provision in the Guidelines. However, again, there was a substantial delay in the enforcement process due to the actions of the Respondent, and there was a hearing. The

Decision and Order suggest that the Panel felt that the Respondent was also guilty of substantially delaying the process.

In the present case, the Respondent, other than to file an application for approval of what she had already constructed, simply did nothing. Therefore, this Panel is faced with relying solely upon the provision of the Guidelines to support an award of attorney's fees. For the reasons stated, a strict reading of the Guidelines, in the opinion of the Panel, does not include the authority to award attorney's fees as the Guidelines are presently written.

Based upon the foregoing Findings of Fact and Conclusions of Law it is as of April 24, 2008, hereby **ORDERED** as follows:

1. Respondent, Marlana Kelley must within 30 days from the date this Decision is issued perform the following actions at her property at 14203 Angelton Terrace, Burtonsville, Maryland:
  - a. Submit to the Complainant a proper architectural change request for the fence that she has installed, to include a survey plat for the property that shows the location of the fence and a copy of the building permit for the fence issued by Montgomery County; and further, to replace 3 missing post caps.
  - b. Replace all missing shutters with those that match the remaining shutters, or else submit to the Complainant a proper architectural change request for the shutters if Respondent intends to change all of the shutters and replace them with shutters of an approved style and color.



- c. Replace all missing screens, or else remove all screens from the front of the house so that the front windows of the house present a uniform appearance.
- d. Reimburse Complainant the sum of \$50.00 (fifty dollars) to cover the cost of filing this dispute.

2. The request for attorney's fees is denied.

Commissioners Fleischer and Kivitz concurred in this Decision.

Any party aggrieved by the action of the Commission may file an administrative appeal to

the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, pursuant to the Maryland Rules of Procedures governing administrative appeals.

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John F. McCabe, Jr., Panel Chair